Holdeman v. *Davis,* 28 W. Va. 324. It is presumed that courts will grant the relief to which parties show themselves entitled, and applications for prohibition are premature until exception has been taken to the jurisdiction of the lower court and overruled. *Ex parte Hamilton,* 51 Ala. 62; *Baughman* v. *Sup. Ct.,* 72 Cal. 572; *Hudson* v. *Judge,* 42 Mich. 239; *State* v. *Gill,* 137 Mo. 681. In the present case there was no cause pending before the lower court. It is stated that the fact that counsel has noticed a motion for hearing before a lower court, is not sufficient ground for a prohibition, *Priznitz* v. *Fischer,* 4 Minn, 366; see 12 Am. Dec. 609, note. Here, where there had been only a threat of prosecution, the case would seem to be even clearer. Moreover, the court had jurisdiction over the general class of cases in which the particular case falls, and so the petitioner, in case of prosecution, would have a remedy by appeal or writ of error.

PUBLIC OFFICERS—AGREEMENT BETWEEN OFFICERS AS TO TERM.—Where two school trustees were elected at the same election to fill a two and three-year term, and the voters failed utterly to designate to whom was the long term, *held,* that an agreement between the two trustees elected was a proper method of deciding the question. *Gilbert* v. *Lucas* (1908), — Ct. App. Ky. —, 107 S. W. Rep. 751.

While the trustees were elected under a statute prescribing viva voce voting, the court proceeds on the authority of *Hobbs* v. *Uppington,* (28 Ky. Law. Rep. 131), involving written ballots. In that case five men being elected to fill four regular terms and one short term in the Board of Aldermen without any designation as to the person to hold the short term, it was held that the appellant was estopped to deny an agreement by which he was to take the short term if he was elected president of the council. This case seems to fly in the face of the rule that ballots making no designation of the offices intended to be filled *are void* for uncertainty. 15 CYC. 347. Thus, in *Page* v. *Kuykendahl,* 161 Ill. 319, a case on all fours with the principal case except that the election was by ballot, it was held that ballots cast at an election held to choose one director for a long term and one for a short term, where they contain the names of two persons without anything to show which term either was intended to fill, are absolutely void. To the same effect are *Gilliland's Appeal,* 96 Pa. St. 224; and *State* v. *Griffey,* 5 Neb. 161. It is admitted by all the cases that a greater number of votes cast for one candidate does not show that he is preferred by the electors for the longer term. The rule in the principal case may seem to work out substantial justice between the candidates, but it lays aside entirely the right possessed by the people to choose a particular man for a particular office. Under it, the disposition of the offices is made not by the electors, but depends upon a subsequent agreement entered into by the men elected.

SALES—CONDITIONAL SALES—DEFAULT IN PAYMENT—DEFAULT OF SELLER. —Defendant entered into a contract for the purchase of certain personal property. It was agreed that the title should remain in the plaintiff until the pur-

chase price was paid in full. Certain of the agreed installments were paid in the manner provided, but subsequent ones were not paid. Previously a lien had been filed against the same property and an action to foreclose it was still pending; but of which defendant had no notice. On the default of the defendant, plaintiff sued to recover possession of the property. *Held,* that plaintiff could not recover the property for default of defendant in making payment caused directly by the default of plaintiff in refusing to give title free of lien. *Gennelle* v. *Boulais et al.* (1908), — Wash. —, 93 Pac. Rep. 421.

The point raised in the case seems to be a novel one. The plaintiff rested his case on the broad principle that a bailee, a tenant, or a purchaser, will not be permitted to deny the title of his bailor, landlord, or vendor. This is recognized generally as the rule. *Peebles* v. *Farrer,* 73 N. C. 342; *Cody* v. *Quarterman,* 12 Ga. 386; *Baumgarten* v. *Smith,* 37 Tex. 439. But the court did not think the above rule was applicable in the principal case. A purchaser of personal property may maintain an action against his vendor for breach of warranty of title without returning or offering to return the property. *Sargent* v. *Currier,* 49 N. H. 310; or, he may recoup his damages in an action for the purchase price. *Peden* v. *Moore,* 1 Stew. and Port. (Ala.) 71. Reasoning from these rules, the court did not think that a mere change in the form of action should operate to forbid a vendee in possession the same rights he might have secured in an action for damages. The court, however, made no distinction on this point between an absolute sale and a conditional sale, and it would seem that a distinction might have been drawn. The plaintiff was not bound to convey a title until the defendant had performed his part of the agreement, namely, when the purchase price was paid. And, if he tendered a good title then, it would seem that he was not in default, no matter what was the condition of his title previous to that time. The appellant conceded that the same rule applies to both real and personal property. The court cited *Stein* v. *Waddell,* 37 Wash. 634, and *Dennis* v. *Strassburger,* 89 Cal. 583, to show that the party to a sale of real estate who is in default cannot maintain an action for the rescission of the contract. In the principal case, this principle was recognized and, in addition, it conceded the right to the vendee to dispute the title of the vendor in an action brought for possession.

SALES—IDENTIFICATION OF SUBJECT-MATTER.—Plaintiffs contracted for the purchase of twenty tons of hay from one Carr. The hay in question was part of a larger quantity stored in Carr's barn. It was agreed that plaintiffs were to take the hay away at their convenience; that 500 cubic feet should be estimated as a ton, and that the 10,000 cubic feet should be ascertained by measuring from the east end of the mow, taking the entire width of the barn. No separation of the twenty tons was made, and no measurement or weighing actually took place. The hay was attached by defendant, a deputy sheriff, and sold as Carr's property. In an action for conversion, *held,* that the method agreed upon for measuring the hay belonging to plaintiffs sufficiently designated the subject matter of the